IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.547 OF 2007

IN

NOTICE OF MOTION NO.630 OF 2007

IN

L.C.SUIT NO.237 OF 2007

The Municipal Corporation of
Greater Mumbai .. Applicants
(Orig.Defendants)

Versus

Shri Ramdas Maharaj Ramasahay .. Respondent
(Orig.Plaintiff)

Ms.Geeta Jogalekar with Shri N.V. Walawalkar learned Senior Counsel for the Appellants/BMC

Mr.A.M. Sarogi for the Respondents

CORAM : S.R. SATHE,J.

DATED : 10th Oct.,2007

ORAL ORDER :-

1. By consent heard finally at admission stage.

2. The Municipal Corporation of Gr. Mumbai-original

defendant in LC Suit No.237 of 2007 have preferred this appeal against the order passed by the learned Judge, City Civil Court, Bombay in Notice of Motion No.630 of 2007 filed by the original plaintiff seeking mandatory injunction directing the defendant Corporation to reconstruct the plaintiff's premises admeasuring 20' x 40' situated at K.M.Kutir on Shivshakti Lalji Hanuman mandir, Opp.Metro Cinema, Mumbai which was demolished by the defendant Corporation on 23-12-2006 or permitting the plaintiff to reconstruct the said structure or allow him to construct temporary plastic shed having AC sheet roof or GI sheet and restraining Corporation from dispossessing plaintiff from open space admeasuring about 20' x 40' described in detail in the plaint, till the disposal of the suit, was partly allowed holding that the plaintiff would be entitled to remain in possession of the area which he was holding on the date of demolition.

3. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendant Corporation.

4. Brief facts giving rise to this appeal are as under

. It is plaintiff's case that the suit premises admesuring 20' x 40' at K.M.Kutir on Shivshakti Lalji Hanuman Mandir, Opp. Metro Cinema, Mumbai is in

existence since 1927-28. The said Hanuman mandir or temple is situated in the said premises and plaintiff is also residing in the said premises. Plaintiff is having his ration card on the said address. He has obtained electric connection and telephone connection on the said address. According to the plaintiff, his son Krishna Murari Sharma has obtained the said telephone connection. The plaintiff's son is engaged in social activities and particularly in social activities of AID's awareness and as a part thereof, he provides condom free of charge to public at the said place. The plaintiff's son is practicing in Ayurved medicines. According to Plaintiff, since last several years number of devotees used to visit the said temple and on every Saturday there used to be Bhajan and kirtan at the said place.

5. Adjoining to the suit premises there is one garage owned by Devid Raja Nadar. With a view to grab the said property the said Nadar started harassing the plaintiff and giving threats. He also used to pick up quarrels with plaintiff and his son and used to make false complaints against them. Plaintiff also learnt that the said Nadar has filed LC Suit No.5134 of 1999 against the defendant Corporation challenging the notice of demolition issued by the defendant Corporation to him. Apprehending that his premises would be demolished,Nadar started making efforts to secure the suit premises. In

November-2003 the officers of the defendant Corporation and the officers of Azad Maidan Police Station also visited the suit premises and gave threats to plaintiff's son. Not only that, on 14-12-2006 Police visited the suit premises and took a bag containing 5000 condoms which was kept by plaintiff's son for free distribution.

6. The plaintiff lodged a complaint with superior officers of the police as well as to various other authorities regarding the threats given by the police officer and Corporation officers and by Mr.Nadar. On 23-12-2006 at about 9-30 a.m. the officers of Azad Maidan Police Station including lady constable went to the suit premises and they arrested all the family members of the plaintiff and took them to Azad Maidan Police station. Thereafter the officers/employees of the defendant Corporation demolished the suit premises with the help of bulldozer and also removed the articles of the plaintiff from the said place. According to the plaintiff the said act of the defendant Corporation was totally illegal and unlawful. The family friend of the plaintiff took photographs of the said demolition work. According to the plaintiff the said demolition was carried out by the defendant without giving any intimation/notice to Plaintiff. Hence plaintiff filed the present suit for declaration that the demolition of the suit premises done by the defendant corporation on

23-12-2006 is illegal and against the provisions of Bombay Municipal Corporation Act (hereinafter referred to as BMC Act) and principles of natural justice. He also prayed for mandatory injunction directing the defendant Corporation to reconstruct the suit premises. Plaintiff filed Notice of Motion and prayed for temporary injunction as mentioned earlier.

7. On behalf of the defendant Corporation Shri P.D.Taware, Assistant Engineer, Maintenance A Ward, Fort, Mumbai filed his affidavit in reply and contended that the suit is bad for want of notice under Section 527 of BMC Act. Secondly, he contended that the suit premises which are temple premises were on the foot-fath and therefore notice under Section 314 of BMC Act was issued to the occupier of the said temple and the same was demolished on 23-12-2006 after following due process of law.

8. The defendant Corporation also contended that in PIL No.2063 of 2002,High Court of Bombay had passed order dated 21-9-2003 directing the concerned authorities including BMC to remove the unauthorised shrines/temples on the public foot path for smooth running of vehicular and pedestrian traffic. In order to comply the said order the defendant Corporation issued notice to the occupants of the illegal structures/shrines situated on the foot path. As the suit structure which was a

Hanuman temple was on foot path notice under Section 314 of BMC Act was issued on 22-10-2003 to the owner/occupier of the temple. The plaintiff replied the said notice and submitted some documents. The Assistant Commissioner, A Ward after considering the reply and documents finally came to the conclusion that the suit structure is unauthorised and accordingly informed the plaintiff that the suit structure was not in existence prior to datum line i.e. 1-4-1962 and therefore directed the defendant to remove the said encroachment which was on the foot path. Thereafter the defendant Corporation issued letter to Additional Collector of Mumbai informing the order passed by the Assistant Commissioner of defendant corporation. When the Additional Collector informed that the said premises are under control of B.M.C. notice of the demand for recovery of demolition charges was served on plaintiff on 15-2-2007. As plaintiff failed to deposit the said charges, the defendant Corporation demolished the suit structure. The defendant therefore contended that the action taken by the defendant corporation is legal and valid and plaintiff is not entitled for temporary injunction as prayed.

9. After hearing the arguments of both the learned advocates and considering the documents on record the learned trial Judge came to the conclusion that the plaintiff was in occupation of the suit premises for a

long time. He however, held that notice under Section 314 was issued on 22-10-203 while the said structure is demolished on 23-12-2006 and prior to demolition no intimation/notice of 24 hours, which is usually given, was given by the Corporation to the plaintiff. According to the learned trial Judge there was also no necessity for the defendant to ask for police aid. The learned trial Judge also came to the conclusion that no mandatory injunction as prayed by the defendant can be granted. However, according to him it was necessary to protect the possession of the plaintiff of portion which was in his possession prior to demolition. The learned trial Judge, therefore, passed order holding that the plaintiff would be entitled to remain in possession of the area which he was holding on the date of demolition.

10. The above mentioned order is challenged by the defendant Corporation. In this appeal before me, Shri Walawalkar, Senior Advocate for the defendant Corporation has urged only two points. Firstly, he submitted that Corporation had issued notice under Section 314 of BMC Act to the plaintiff. Not only that but plaintiff had given reply to the same and the Assistant Commissioner after considering the said reply carried out the demolition activity as per directions given in the above mentioned PIL, as the suit structure was on foot path. Secondly, he canvassed before me that as the plaintiff is not having any legal right to remain

in possession of the said property the plaintiff was not entitled to get any temporary injunction as prayed and the order passed by the learned trial Judge is illegal.

11. As against this Shri Sarogi, learned Advocate for the plaintiff submitted that there is abundant evidence on record which prima facie shows that the plaintiff and his son were in occupation of the suit premises. Not only that but the plaintiff's son had also obtained necessary license for doing his profession at the said place under the Bombay Shops and Establishment Act. The defendant Corporation ought to have given intimation before the demolition and they could have atleast given 24 hours notice as per Section 488 of BMC Act. He therefore submitted that the order passed by the learned trial Judge is legal and correct. Secondly, he canvased before me that when the Plaintiff is in possession of the suit premises it is in fact necessary to protect the said possession till the decision of the suit. He therefore submitted that the appeal be dismissed.

12. It is in fact not in dispute that the suit premises was in existence for last several years and there was Hanuman temple at the said place. Plaintiff has produced his ration card as well the identity card issued for the purpose of election. From the perusal of the same it does appear that the plaintiff was residing at the said place along with his family members. When

such is the position the question arises whether the action taken by the Corporation is legal and correct and what is the effect of the demolition.

13. It is the case of the Corporation that they had issued notice under Section 314 of BMC Act to the plaintiff. Copy of the said notice is produced on record. From the perusal of the same it is very clear that the said notice was issued in pursuance of the directions given by the High Court in PIL No.2067 of 2002 whereby it was directed to remove the unauthorised structure, illegal shrines so that foot path/public road/public place can be cleared and put up to use for the purpose for which the said sites are designated. It is the case of the Corporation that they had also issued public notice in newspaper under Section 314 of BMC Act. It appears that notice issued to the plaintiff is dated 21-10-2003 while the reply given by the plaintiff or rather letter written by the plaintiff to the defendant Corporation is dated 17-10-2003. Probably, he might have written the said letter in pursuance of the public notice. However, one thing is certain that in that letter he had specifically averred that temple is at the said place since 1927 and it is at the distance of about 40’ from foot path. So, under the circumstances it is necessary to find out whether the suit premises were in fact situated on the foot path or on a public road as alleged by the defendant corporation.

14. It is true that plaintiff has not adduced any evidence to show as to how he acquired the right, title and interest in the suit premises. However, merely because the plaintiff has failed to show source of his title that does not mean that he can be evicted from the said place without following due process of law. In order to find out whether the action taken by the defendant Corporation under Section 314 of BMC Act was legal and proper it would be worthwhile to see the provisions of Section 314 (a) and (b) which read as under :-

> " Section -314. {Power to remove without notice anything erected, deposited or hawked in contravention of Section 312,313 or 313A.}-- The Commissioner may, without notice, caused to be removed -
>
> (a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-section (1) of section 312, after the same comes into force {in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act,

1950 {or in the extended suburbs after the date of the coming into force of the Bombay Municipal {Further Extension of Limits and Schedule BBA (Amendment)} Act, 1956;}

(b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached or suspended in, upon, from or to any place in contravention of sub-section (1) of section 313;"

15. It is also necessary to see what Section 312 Says. The said Section 312 runs as under :-

"Section 312 - Prohibition of structures or fixtures which cause obstruction in streets--

(1) No persons shall, except with the permission of the Commissioner under section 310 or 317, erect or set up any wall, fence, rail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain, well or tank in any street so as to form an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion of such street, channel, drain, well or tank.

(2) Nothing in this section shall be deemed to apply to any erection or thing to which clause (c) of Section 322 applies".

16. It is the case of the plaintiff that the suit premises are erected or constructed by causing encroachment on the foot path. Naturally, it was necessary for the defendant Corporation to adduce some prima facie material to show that the suit structure was actually on foot path or any street. Besides the bear word of the officer of the defendant Corporation there is absolutely nothing on record to show that the structure was on foot path. In fact while considering this aspect it must be noted that the Corporation had in fact issued a letter dated 20-11-2003 to the Additional Collector, Mumbai wherein they had mentioned that the Corporation has taken a drive for demolition of shrines/temples on municipal lanes/roads etc. According to them the temple in question is situated on Government land and hence the Corporation had asked the Government to take necessary action after verifying the proof. It obviously means that the Corporation was in fact not sure that the suit premises are on foot path or public street. It is true that the Additional Collector informed to the Corporation that after perusing the record it appeared that the land in question is with Bombay Municipality for road foot path. However, still

there is no prima facie evidence to show that the structure in question was actually on the street or foot path. While considering this aspect a useful reference can also be made to the definition of "street" and "public street" given in Section 3 wherein it is mentioned:

> 3(w) "street" includes any highway and any causeway, bridge, via duct, arch road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and has access uninterruptedly for a period of twenty years; and, when there is a footway as well as carriageway in any street, the said term includes, both;

17. Whereas the public street is defined in Section 3(x), wherein it is mentioned :

> "3(x) "public street" means any street heretofore levelled, paved, metaled, channelled, sewered or repaired by the Corporation and any street which becomes a public street under any of the provisions of this Act; {or which vests, in the corporation as a public street}";

18. Thus, it appears that it was very easy for the defendant Corporation to lead prima facie evidence to show that the suit premises was situated on the public street. The defendant Corporation has not done so. Of course, it does appear that the temple or suit premises may be on a land which is owned by the Corporation or by Government. However, there is nothing to show that the said land was part and parcel of public street or road. Nor there is any material on record to show that the said particular piece of land where the suit premises or hanuman temple was constructed was meant for any particular public purpose. What is more to be noted is that from the material on record it appears that even after the demolition of the suit structure/ temple the plaintiff continued to occupy the portion or the land on which the Hanuman temple is situated. There is absolutely no material on record to show as to when and how plaintiff occupied that portion. It is not even argued on behalf of the Corporation that plaintiff was not in actual possession of the said area when the suit was filed. So, considering this aspect the learned trial Judge rightly rejected the plaintiff’s prayer for granting mandatory injunction or permitting him to carry out any temporary structure on the said place. However, he has only allowed plaintiff to remain in possession of the area which was held by him till date of demolition.

19. The learned Advocate for the defendant Corporation

could not convince me on the point that by virtue of demolition of the suit structure on 23-12-2006 the plaintiff was actually dispossessed of the land below the structure. On the contrary it appears that he continued to occupy the said portion even after 23-12-2006. It suggests that the objection of Corporation was only for unauthroised construction and not for entry over the said area. So, considering all these aspects it can not be said that discretionary order passed by the learned trial Judge in Notice of Motion is arbitrary or capricious or perverse. So, under said circumstances I do not find it necessary to interfere with the said order in this appeal. Hence I pass the following order:-

O R D E R

. The Appeal is dismissed.

. The Trial Court is directed to dispose of the suit according to law as expeditiously as possible and in any event by the end of February 2008, independently and without getting influenced by the observations made by this Court in this order.

. Both the parties to co-operate the trial Court for expeditious disposal of the suit.

(S.R.SATHE,J.)